May 26, 2009

VIA E-MAIL (regs.comments@federalreserve.gov)

Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

Re: Proposed Rule Implementing Title X of the Higher Education Opportunity Act of 2008, Docket # R-1353

Dear Ms. Johnson:

The First Marblehead Corporation ("FMC") submits this letter (this "Letter") in response to the publication by the Board of Governors of the Federal Reserve System (the "Board") of proposed regulations, 74 Fed. Reg. 12464 (the "Proposed Rule"), implementing certain requirements of Title X of the Higher Education Opportunity Act of 2008, P. L. 110-315, 122 Stat. at 3478-3490 (August 14, 2008) ("Title X" or "HEOA").

FMC (together with its subsidiaries, the "Company") provides outsourcing services for private education lending in the United States, including without limitation program design services, loan application processing and origination, and customer service. The Company offers services to national and regional financial institutions and educational institutions for designing and implementing private education loan programs intended to help meet the demand for private education loans. FMC's subsidiary, Union Federal Savings Bank ("Union Federal"), is a federally chartered thrift that has offered private education loans directly to consumers and offers residential retail mortgage loans, retail savings products, time deposit products, money market accounts and demand deposit accounts. As a result of its ownership of Union Federal, FMC is a savings and loan holding company subject to regulation, supervision and examination by the Office of Thrift Supervision of the Department of the Treasury.

First Marblehead

800 BOYLSTON STREET • 34TH FLOOR • BOSTON, MASSACHUSETTS 02199 • TEL: 617.638.2000

The Company commends the Board for its effort in drafting the Proposed Rule and thanks the Board for the care and attention taken to achieve the goals of consumer usefulness and operational feasibility. The Proposed Rule makes good progress in better defining many of the ambiguities in Title X, but there are some elements of the Proposed Rule that could benefit from further clarification. As a private student loan processor and lender, the Company submits the following comments on the Proposed Rule for the Board's consideration.

I. Timing and Delivery of Disclosures

a. *Timing of Approval Disclosure.* The Proposed Rule states that the disclosure provided pursuant to 12 C.F.R. 226.38(b) (the "Approval Disclosure") must be provided with "any notice of approval." 12 C.F.R. § 226.37(d)(ii), 74 Fed. Reg. 12492. Many private lenders use an application process in which the student submits an application and is initially approved with a number of conditions, including satisfactory school certification, income and employment verification, and enrollment verification. Only after all conditions are met does the application receive final approval.

The Proposed Rule is silent as to whether "any" notice of approval includes a notice that is conditional. Applying the requirement to conditional approval notices would advance the apparent statutory intent to enable consumers to compare loan products. In addition, creditors typically condition their approval on a range of factors, including those that affect underwriting, security, identity, school certification, and—for consolidation loans—confirmation of the loan amounts involved. It is frequently the case that conditions for final approval of private education loans are not satisfied, resulting in the need to decline or modify the loan. If the conditions are satisfied, the creditor reaches a "final" approval. To treat only the latter event as "approval" for purposes of the Approval Disclosure would not serve the purpose of the requirement for an Approval Disclosure. Final approval, when all conditions are satisfied, may not occur until a time close to the beginning of the school enrollment—

possibly not until late August in a typical school calendar. The Approval Disclosure triggers a 30-day period for the consumer to accept the loan. The purpose of the 30-day window and the accompanying uniform disclosure is to permit the consumer to shop for alternatives, and we believe that it is important to encourage shopping for loan terms. Further, if the Approval Disclosure were required to be provided only upon final approval, the consumer would be required to provide, upon conditional approval, various types of verification to multiple lenders, and multiple lenders would have to seek school certification for the same loan, prior to distribution of the Approval Disclosure. It would make little sense--and would have no real value to the consumer--to provide a shopping opportunity so late in the process.

In sum, it is unclear what purpose, beyond a confirmation of terms, the disclosure received pursuant to 12 C.F.R. § 226.38(c) (the "Final Disclosure") would serve if the consumer did not receive the Approval Disclosure until all conditions were met and the loan was finally approved. Rather, the Final Disclosure would seem to provide a means for informing the consumer of the effect of any changes that have taken place as permitted by proposed 12 C.F.R. § 226.39(c) between the provision of the Approval Disclosure and the Final Disclosure.

For the reasons above, we request that the Board clarify in its commentary to 12 C.F.R. § 226.37(d) (74 Fed. Reg. 12472-73; Comment 37(d)(2), 74 Fed. Reg. 12510) that loan approval includes any notice of conditional approval, and that conditional approval should be treated as "approval" for purposes of triggering the creditor's obligation to provide the Approval Disclosure.

b. *Effect of Conditional Approval; Changes in Terms.* If the conditional approval is the "approval" event for purposes of the Approval Disclosure, as we strongly recommend, we also recommend that the Board clarify that changes made following the Approval

Disclosure but as a result of the articulated conditions are permissible, and would form an acceptable basis for declining the loan and/or making a counteroffer to the consumer.

The Proposed Rule specifies that, after the applicant's receipt of the Approval Disclosure, no changes may be made to the loan terms other than changes: (a) due to a change in the interest index used to compute the interest rate on the loan; (b) requested by the consumer; and (c) that are unequivocally beneficial to the consumer. 12 C.F.R. § 226.39(c); 74 Fed. Reg. 12484-85. In addition to this list, the Company requests that the Board consider limited additional categories of changes that may be made during the period after conditional approval and receipt of the Approval Disclosure without running afoul of the requirement not to alter loan terms disclosed in the Approval Disclosure.

Final approval of private student loans is typically conditioned on a range of factors, including those that affect underwriting, security, identity, school certification, and—for consolidation loans—confirmation of the loan amounts involved. Among others, these may include:

- School certification of enrollment and financial need
- Income verification
- Proof of citizenship
- Visa and passport information from foreign students
- Validation of underlying loan amounts on consolidation loans
- Validation of co-borrower's identification
- Validation of co-borrower's income
- Compliance with USA Patriot Act requirements
- Compliance with requirements of the Office of Foreign Assets Control (OFAC)

For the most part, the failure of a standard underwriting condition would result in the withdrawal (or decline) of a loan; or in some cases, such as an income differential, in a different loan

amount or different terms. We request that the Board modify the Proposed Rule to indicate that changes based on conditions articulated to the consumer may be made during the period after conditional approval and receipt of the Approval Disclosure without running afoul of the requirement not to alter loan terms and may form an acceptable basis for declining the loan and/or making a counteroffer to the consumer.

Accordingly, we also request that the following language be included on the model form as an example of conditional language that would be acceptable on the Approval Disclosure form:

> ***Our approval of your application is subject to:***
> ***(1) our verification of the information provided on or in connection with your application and that there have been no material changes prior to disbursement of your loan;***
> ***(2) information provided by your school, if applicable, and any changes to such information; and***
> ***(3) such other conditions or requirements that arise under applicable law.***

Further, the current language in the "Next Steps and Terms of Acceptance" section indicating that the loan offer cannot change should be revised accordingly. Finally, in accordance with the recommendations made above, we suggest that the Board rename model forms H-19 and H-22 to call them "Private Education Loan Conditional Approval Disclosure" and amend the text to reflect the conditional nature of the approval. The regulation or commentary should clarify that disclosures regarding conditions relevant to the approval may be made separately or together with the segregated disclosures, or the Approval Disclosure may contain any institution-specific conditions so long as they are included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses.

c. *Conditions Based on Information Received from the School.* Of the conditions discussed above, we particularly call your attention to changes based on information received from the covered educational institution, provided in the form of an original or revised school certification, or through other communications from the school (e.g., letters, phone calls, online account entries, etc.). For the reasons provided below, the final rule should explicitly permit changes resulting from information provided by the school (e.g., loan amount, disbursement date, year in school, and adjustments to such items and other changes) without triggering any requirement for a new Approval Disclosure.

One common condition for many private education loans is school certification of the loan amount as not exceeding the applicant's cost of attendance less other financial aid. It is quite common for the applicant to request an amount which is more than the school later certifies. Schools may also submit revised certifications or separately communicate with creditors outside the formal certification process to indicate changes to loan amounts, disbursement dates, enrollment status, and other relevant information through a variety of means including phone calls, emails, letters, and by directly accessing the creditor's online account service. If the amount is less than the amount previously requested or certified, the creditor must reduce the loan amount and change other terms that are related to the loan amount, or else it would be unable to make the loan.

School certification is a unique factor, unlike any other contingency that may arise. The school is independent of both the borrower and the creditor, but it holds the ability to determine the precise amount that the creditor can and should be lending. By certifying the amount, the school ensures that students do not borrow more than absolutely necessary. This serves an important public policy goal, and it is critical that the regulation does not interfere. If creditors were required to restart the 30-day clock if the certified loan amount differs from the amount previously approved, it could be a disincentive for schools to make

modifications in their funding, or to make changes that result in the appropriate amount of aid.

School certification occurs so late in the process that requiring a new Approval Disclosure and 30-day acceptance period following it would unduly hinder the loan application process and burden lenders and consumers. The consumer will have received an approval that was explicitly contingent upon school certification. The Final Disclosure will provide the correct figures, and the consumer will have an additional 3 business days in which to cancel the loan. Finally, it should be noted that reducing the loan amount to reflect the school certification is *beneficial* to the consumer, as it limits what the consumer is borrowing to only the absolutely necessary amount.

We respectfully request that the Board state in the final rule that a change to the loan offer based on information received from the covered educational institution (e.g., loan amount, disbursement date, year in school, and adjustments to such items and other changes) after the Approval Disclosure has been provided does not (i) require the creditor to provide a revised Approval Disclosure, (ii) result in a new 30-day acceptance period, and (iii) require the applicant to accept the revised loan offer.

d. Phone Applications.

i. **Phone Applications "Initiated by the Consumer".** The Proposed Rule provides that, in the case of a telephone application "initiated by the consumer" that is approved, the lender may provide the Approval Disclosure in lieu of the disclosure provided with the application pursuant to 12 C.F.R. 226.38(a) (the "Application Disclosure") if it can do so within 3 business days following the telephone application. 74 Fed. Reg. 12472; 12 C.F.R § 226.37(d)(ii). The Board requests comment on the treatment of solicitations initiated by the creditor. *Id.* For the purpose of providing required disclosures it is not clear why the identity of the initiator of the

application call, for the same loan application on the same terms, would make a difference. In addition, verbal delivery of the required disclosures would not be meaningful to the consumer. We suggest that the Board either delete the words "initiated by the creditor" from its commentary, 74 Fed. Reg. 12472, and proposed 12 C.F.R § 226.37(d)(1)(ii), or revise the phrasing to read "whether initiated by the consumer or the creditor." Either change would make the telephone Application Disclosure rules uniform for all telephone applications.

We also note that the citation in the first sentence of the last paragraph of the second column of Federal Register page 12472 should perhaps refer to 12 C.F.R. § 226.37(d)(1)(ii), and not to 12. C.F.R. § 226.38(d)(1)(ii).

ii. **Denied Phone Applications.** The Proposed Rule does not discuss the effect on disclosure requirements of a denial of a telephone application. The Company believes that the near-simultaneous receipt of the Application Disclosure and the adverse action notice required by the Board's Regulation B would cause significant consumer confusion and irritation. Accordingly, we suggest that the Board clarify that, for denials of telephone applications, the requirements of proposed Subpart F of Regulation Z do not apply.

e. *Definition of "Business Day".* Regulation Z contains two definitions of "business day"—one that includes only days on which the creditor's offices are open to the public, and one which includes all calendar days except Sundays and specified federal holidays. 12 C.F.R. § 226.2(a)(6). The Proposed Rule would adopt the latter definition "in providing presumptions of when consumers receive mailed disclosures, and for measuring the period during which consumers have the right to cancel a private education loan." 74 Fed. Reg. 12467. Elsewhere in the commentary, the Proposed Rule states that the latter definition is also used "for purposes of § 226.37(d)," 74 Fed. Reg. 12473, which includes not

only the presumption for consumer receipt of disclosures, but also the requirement for the creditor to deliver disclosures to consumers within three business days following a telephone application or an approval. (We assume that the description at 74 Fed. Reg. 12467 should be expanded to include the period during which the creditor must mail required disclosures.)

Many private student loan lenders do not have processing centers open on Saturday, even if customer service is available. Counting Saturday as a business day would, for these lenders, reduce timing requirements from three days to two days. Student lending is by its nature seasonal, with a large percentage of annual loan volume disbursed in the summer months. During this peak period, providing required disclosures within two business days may be impossible to achieve. We request that, for purposes of new Subpart F of Regulation Z, the Board adopt the more general definition of business day under Regulation Z.

f. *Disclosure Requirements for Specialty Loan Types*. The Proposed Rule does not specifically indicate the extent to which the disclosures required in Subpart F must be delivered for certain types of specialty student loans. Proposed comment 38-1 states that disclosures required under section 226.38 need to be provided only "as applicable," except where it specifically states otherwise. The example provided in the Commentary is that the disclosure of the availability of federal student loans in the Application and Approval Disclosures is not required for consolidation loans.

We recommend that the Board provide in this Commentary section a more thorough, *nonexclusive* list of disclosures that do not need to be provided because they would be inapplicable in certain cases. For example, further clarification is needed to address loans where the self-certification disclosure in section 226.38(a)(8) is not necessary, and where other disclosures, including those required by sections 226.38(a)(6) and (b)(4), are not required. We recommend that the Board state in the

Commentary that these particular disclosures are inapplicable for the following categories of loans:

- Consolidation Loans
- Loans to cover past due amounts
- Bar study loans
- Residency loans
- Relocation loans

II. Self-Certification. The HEOA requires that lenders obtain from the consumer, prior to consummation of a private education loan, a self-certification form. HEOA, Title X, § 1021(a); Truth-in-Lending Act § 128(e)(3).

a. *School-Certified Loans* -- The Proposed Rule does not make reference to loans that are "certified" by the school, a process in which the school certifies for the lender that the student is enrolled and has unmet financial need in the amount of the loan for which the student is applying. Therefore, the Proposed Rule would require lender collection of the self-certification form even where the school also certifies the loan. In addition, the Proposed Rule requires only that the lender collect the form; it is unclear what obligation the lender has, if any, to resolve any apparent discrepancies between the self-certification provided by the applicant and the certification that the school provides.

This requirement will result in unnecessary duplication of effort on the part of the school, needless gathering of extra information by the lender, and potential administrative burden and operational delay in resolving discrepancies between the two forms of certification. Although we recognize that neither the HEOA nor the Proposed Rule require the lender to do anything with the self-certification other than collect it, we also believe that general safety and soundness regulatory principles may impose implied duties on lenders to resolve any discrepancies.

We believe that the compliance burden created by requiring self-certification for school certified loans is significant enough to invoke its exception or exemption authority, as the Board has done in several other instances in the Proposal (e.g., the proposed treatment of telephone applications). Moreover, by securing a school certification the creditor facilitates the important public policy objective of assuring proper loan amounts, which serves the same purpose as the self-certification process in preventing over-borrowing. As such, eliminating the self-certification requirement for "school certified loans" removes an unnecessary burden for schools and consumers while preserving the desired public policy outcome of responsible lending and borrowing.

For these reasons, we request that the Board use its authority to eliminate duplicative requirements by exempting from the self-certification requirement loans that the school certifies. We further suggest that the Board define school certification as written communication, regardless of its method of collection, that contains a written certification of the student's enrollment at the institution of higher education as well as certification of the student applicant's need for the requested loan amount.

Specifically, the Company proposes:

> (i) adding a new definition of "school-certified loan" to proposed 12 C.F.R. § 226.37(b):
>
> > "*School-certified loan*" means a private education loan for which the creditor requires as a condition of making the loan that the institution of higher education provide, regardless of its method of transmission and collection, a written certification of the student's enrollment at the institution of higher education as well as certification of the student applicant's need for the requested loan amount.

(ii) adding the following to proposed 12 C.F.R. § 226.39(e): "The creditor shall not be required to obtain the self-certification form from the applicant where the private education loan is a school-certified loan."

If the Board does not choose to eliminate the self-certification requirement for school-certified loans, an alternative would be for the Board to permit the school to certify to the creditor that the consumer has completed and signed the self-certification. Schools often certify loans to lenders electronically, which may make it difficult for the school to convey to the creditor the self-certification form, as signed by the consumer. If the school is certifying the loan to the creditor anyway, it is unnecessary to require the school or the consumer also to physically or electronically convey the self-certification to the creditor. Instead, we suggest that, if the school has obtained the self-certification from the applicant, the school should then be permitted to certify compliance directly to the creditor. The Board could provide model language for the school to use in order to certify that the applicant had signed a self-certification.

b. *Provision of Form by Lender* – The Proposed Rule requires that the school make the self-certification form available to the borrower and clarifies that the lender may receive the self-certification form from either the student or the school. 74 Fed. Reg. 12486. However, the Proposed Rule does not specify whether the lender may expedite the application process by providing the form for the student to complete and submit. Title X provides that the form shall be made available to the applicant by the school upon the request of the applicant, but does not expressly prohibit others from also providing the form. We believe that the intent of Congress was to ensure the school's cooperation with the education loan process, and was not to create a limitation as to the entities that could provide the form to the student. Whether or not the Board chooses to eliminate or modify the requirement for self-certification of school-certified loans, in any case where the form is required and the student has not obtained the form

from the school, the lender should be able to expedite the application process by providing the form as part of the application for the student to complete.

c. *Scope Requirements* – The Proposed Rule is clear that the self-certification form need not be obtained for consolidation loans. 74 Fed. Reg. 12486. However, the Proposed Rule does not indicate whether the requirement to collect the form is applicable to other types of specialty student loans, including bar study loans, medical residency and relocation loans, and loans for past due balances.

In all of these cases, the information provided on a self-certification form would not be helpful to the lender and not useful for the student. With respect to the first two categories, the loan is in most cases not being made to pay for qualified education expenses at a covered educational institution. Even in the case where a bar study loan is used to pay in part for a bar study course at a covered educational institution, much of the information required in the self-certification form is not relevant (e.g., expected family contribution). In the case of a past due balance, the loan is not being made for a current term to which current financial aid figures apply. For these reasons, the Company suggests that bar study loans, medical residency and relocation loans, and loans for past due balances be explicitly exempted from the requirement to obtain a self-certification form.

d. *Distinction Between "Institutions of Higher Education" and "Covered Educational Institutions"*. The Proposed Rule requires receipt of the self-certification form from students attending "institutions of higher education" but not from those attending "covered educational institutions" that would be "institutions of higher education" if they were accredited. 12 C.F.R. § 226.39(e); 74 Fed. Reg. 12486. In implementing this rule, it is not clear which accrediting authorities are relevant or, accordingly, how lenders should distinguish one group of schools from the other. We suggest that the Board (a) specify that the lender refer to a

Department of Education web site such as http://ope.ed.gov/accreditation/ to ensure uniform application of the requirements and (b) provide lenders with a 90-day safe harbor for updating systems to accommodate periodic changes to the list.

III. Multi-Purpose Loans. Title X of the HEOA defines "private education loan" as a loan made "expressly" for qualified higher education expenses. Truth-in-Lending Act § 140(a)(7), 122 Stat. 3480. In the Proposed Rule, the Board classified multi-purpose consumer loans as private education loans if the consumer indicates in the loan application that the proceeds will be used "in whole or in part" for qualified education expenses, and the Board requested comment on whether the disclosure requirements of Title X should apply to such loans. 12 C.F.R. § 226.37(b)(5); 74 Fed. Reg. 12471, 12492.

The inclusion of multi-purpose loans creates compliance problems for both large and small financial institutions. Large lenders typically do not have integrated processing and operational systems for all loan products the bank offers. The system that processes multi-purpose consumer loans will not have the operational infrastructure to support the detailed disclosure requirements, and it would be unduly burdensome to require that such infrastructure be built. In addition, extensive training of branch representatives would be required for the recognition and processing of such loans because the requirement creates the operational necessity of scrutinizing each application for an indication that it will be used for education expenses, and then forwarding such applications for specialized processing. Small institutions, especially those without existing student loan programs, are unlikely to know that the proposed requirement exists for multi-purpose loans, will not have the capability to deliver the required disclosures, and in all likelihood will not deliver them.

For these reasons, we suggest that the word "expressly" in the HEOA definition of "private education loan" was intended to include loans specifically marketed as student or education loans

and not general purpose consumer loans. As a result, we request that the Board delete the phrase "in whole or in part" from the definition of "private education loan" and clarify in the Staff Commentary that private education loans include only those that are marketed for use in paying higher education expenses.

IV. Content of Disclosures.

a. Disclosure of Interest Rate.

i. **In Web and Telephone Applications** – Title X and the Proposed Rule require the disclosure of interest rates as part of the Application Disclosure. Truth-in-Lending Act § 128(e)(1)(A); 122 Stat. 3483. For web sites and telephone applications, the disclosure is required to be in "real time" – accurate when viewed or disclosed. Proposed Comment 38(a)(1)(i)-1; 74 Fed. Reg. 12475. This requirement will be very difficult to implement.

As a practical matter, changes to web sites occur in scheduled release dates that in all likelihood will not match up with interest rate change dates. For phone applications, product information for customer service representatives needs to be updated. If many different private loan products are being originated, as has historically been the case for the Company, this is difficult to do system-wide in a day's time. Historically, in connection with web sites and phone applications, regular updates have been made, but "as of" dates have been used to disclose rates. The Company suggests that, as the Board has permitted in similar contexts, the interest rates in web sites and telephone applications be permitted to be "as of" a particular date not more than sixty (60) days prior to the date when the rate is viewed or disclosed.

Although rates can change frequently, the systems cannot make the change so promptly on the web page that it is concurrent with the actual change in the rate being offered. As

a result, there would be many times during transitions between offered rates that the rate "being viewed" on the web is no longer the current rate. The problem is really no different than creditors face with disclosures that are delivered in electronic form or by printed means, and a similar solution would be appropriate (that is, that the rate needs to be one that has been offered within the previous 30 or 60 days). An alternative approach might be to require that it be stated as "good as of" a particular date, with a means of contacting the creditor to determine the current rate.

ii. **In Approval and Final Disclosures** – As a result of consumer testing conducted by the Board, the Proposed Rule requires the prominent disclosure of interest rate as part of the Approval Disclosure and the Final Disclosure. 74 Fed. Reg. 12466, 12467-68. Disclosure of interest rate more prominently than annual percentage rate ("APR"), as the Board recognizes in its request for comments on this subject, is susceptible to abuse with the use of "teaser" rates, loans with low rates but high fees, and the inclusion of interest rate reductions from borrower benefits that are contingent on future borrower repayment behavior. *Id.* at 12468. Although the Company believes that APR is a better comparison tool than interest rate, we also recognize that the Board's consumer testing indicated that disclosure of interest rate along with a prominent disclosure of APR was not meaningful, and to many consumers, was confusing. If the Board maintains the conspicuous disclosure of interest rate in the Approval Disclosure and the Final Disclosure, we suggest that the Board specify that: (a) the disclosed rate must be a fully indexed rate; and (b) the rate may not reflect the application of any borrower benefits.

Borrower benefits are post-closing incentives for which borrowers qualify based only on subsequent events triggered by consumer performance, which cannot be known by the creditor at the time of disclosure. Given the significant

uncertainty about whether such post-closing incentives will apply to a loan, we believe it is inappropriate to include such items as part of rate disclosures.

Moreover, permitting disclosures based on such borrower benefits, even as estimates, could interfere with the ability of consumers to shop for credit. Allowing or requiring borrower benefits to be a basis for calculating interest rates could lead to misleading (artificially low) interest rate disclosures that obscure, rather than provide transparency about, the true cost of credit. As a result, consumers could unknowingly choose more expensive loan products, which would in turn unnecessarily increase overall debt burden and contribute to negative repayment performance.

b. *Description of Deferral Options*. The Proposed Rule requires that the Application Disclosure and the Approval Disclosure contain "a description of the length of the deferment period, the types of payments that may be deferred . . . a description of any payments that are required during the deferment period [and] disclos[ure] of any conditions applicable to the deferment option, such as that deferment is permitted only while the student is continuously enrolled." 12 C.F.R. 226.38(a)(3)(ii), 226.38(b)(3)(iii); 74 Fed. Reg. 12476; Comment 38(a)(3), 74 Fed. Reg. 12511. Deferment policies memorialized in the borrower credit agreement or promissory note typically contain nuances for unusual situations and specific details about calculation of the deferment period, grace period, and additional deferment permitted for additional schooling, internships, and/or once repayment begins. We request that the Board clarify that the required details for the Application Disclosure and the Approval Disclosure (in addition to information included in the table in the model form) are: (a) length of maximum initial in-school deferment period for the loan program; (b) enrollment requirements for maintaining chosen deferment options, and (c) an instruction to consult the credit agreement or promissory note for further details.

c. *Disclosure of Forbearance Policies*. The Proposed Rule requires the disclosure of any deferment or forbearance available after a private student loan enters repayment. Proposed Comment 38(a)(3)-2, 74 Fed. Reg. 12476, 12511. Lender deferment and forbearance policies during repayment periods (such as armed forces deferment, hardship forbearance, modified repayment schedules, and natural disaster forbearance) typically have detailed eligibility and other requirements. In addition, because of their varied requirements, granting these deferments and forbearances is commonly reserved to the discretion of the lender. Given their varied nature and detailed requirements, we believe that disclosure of these policies is not feasible beyond a statement of their general availability. We request that the Board clarify that the lender needs to disclose only whether forbearance and/or deferment policies may be available during loan repayment and if they may be, include a direction to contact the loan servicer for more details.

d. *Borrower Benefits*. Some private loan lenders offer borrower benefits (such as an on-time payment benefit) that reduce the interest rate on the loan if a specified number of payments are made on time. Elsewhere in this Letter, we have requested that the Board clarify that disclosure of the interest rate in the Approval Disclosure and the Final Disclosure not include the effect of any borrower benefits. Likewise, with respect to the disclosure of the total cost examples in all three required disclosures, we request that the Board specify that in calculating total cost examples in any of the disclosures that Subpart F requires the lender not to take into account any borrower benefits in calculating such examples.

e. *Estimates and Redisclosure.* Proposed Section 12 C.F.R. 226.37(e) states that, if any information required to make the disclosure is unknown to the creditor, the creditor must make the disclosures based on the best information reasonably available, and to state clearly that the disclosure is an estimate.

There are occasions when it is necessary to provide estimated disclosures at the time of approval, as permitted by Regulation Z, based on the best information reasonably available. The regulation should clarify that, as a general rule, if estimates are used in Approval Disclosure, and new information becomes available that corrects the estimate before the Final Disclosure, that event would not be a prohibited change in terms and would not require a new Approval Disclosure or a new 30-day acceptance period.

i. **Loan Disbursement Date** – By way of example, unique to private education loans is the need for the creditor to estimate the annual percentage rate (APR) based on the loan disbursement date. The estimate is made necessary because the disbursement date is often determined by the school, rather than by the creditor. If a new Approval Disclosure and a new 30-day acceptance period were triggered by a change in the APR when the actual disbursement date is established, the date would potentially move back an additional 30 days, and the whole process would begin again. In any event, the impact on the APR of these disbursement timing changes would be small, and would not affect the more prominent interest rate disclosure at all.

   Further, for the convenience of schools and borrowers, many private student loans are divided in more than one disbursement over the course of an academic year. Some lenders provide the disclosures required by 12 C.F.R. § 226.18 with each disbursement, and a corresponding right to cancel each disbursement. In Title X of HEOA and the Proposed Rule, all required disclosures are given prior to the first loan disbursement, but no guidance is provided on the treatment of loans with multiple disbursements. We request that the Board specify that, for private student loans with more than one disbursement: (a) the disclosures required under new Subpart F of Regulation Z must (1) estimate disbursement dates for subsequent disbursements, and (2) in all

calculations, assume that all disbursements are made; and (b) any cancellation, timing, or adjustment in amount of a subsequent disbursement after the Final Disclosure has been delivered does not trigger a requirement for any new disclosures.

ii. **Consolidation Loan Amounts --** In the case of consolidation loans, the creditor may not know the requested loan amount until very late in the application process and therefore would be required to base much of the information in the Approval Disclosure on estimates. Therefore, we recommend that the Board acknowledge that the principal amount and related terms in the Approval Disclosure for consolidation loans may need to be estimates. It should also be made clear that the creditor need not re-disclose the Approval Disclosure, triggering an additional 30 day acceptance period when the creditor gets the final payoff amounts. It would be a potentially time consuming and wasteful process if the disclosure must be repeated.

In sum, we ask the Board to make clear that, if a subsequent event makes the Approval Disclosure inaccurate before consummation and the disclosed term(s) is based on an estimate and is labeled as an estimate in the Approval Disclosure then: (i) creditors do not incur any liability for providing an inaccurate Approval Disclosure and (ii) creditors are not required to provide a new Approval Disclosure.

V. Acceptance and Cancellation.

a. *Ability to Exercise Rights to Accept and Cancel.* The Proposed Rule states that if there are multiple applicants for a loan, the required disclosures may be delivered to any primary obligor on the loan. 12 C.F.R. § 226.37(f); 74 Fed. Reg. 12473. The Rule does not, however, clarify which of the applicants may exercise the rights to accept and cancel the loan. The primary obligor, who receives

the disclosures, will be the applicant best informed of the approval and cancellation rights and therefore in the best position to exercise those rights. We request that the Board clarify its comments to Sections 226.37(f), 226.39(c), and 226.39(d) by specifying that only the applicant receiving the required disclosures may exercise the right to accept and the right to cancel set forth in the Approval Disclosure and the Final Disclosure, respectively.

b. *Methods of Acceptance.* The commentary to the Proposed Rule states that lenders may specify methods of loan acceptance, and requires that the lender disclose the permitted methods to the applicant. Proposed Comment 39(c)-2, 74 Fed. Reg. 12484, 12513. The only restriction placed on methods of acceptance is that electronic acceptance may not be the sole method offered. *Id.* According to the supplementary information, the reason for this restriction is that "the Board believes that not all consumers have access to electronic forms of communication and that a form of acceptance in addition to electronic communication is appropriate." 74 Fed. Reg. 12484.

Increasingly, applicants prefer electronic communication with financial institutions, and the applicants applying for private educational loans are disproportionately inclined that way. We believe there is no reason not to permit them to choose to communicate electronically with the institution, whether to receive disclosures electronically or to notify the institution of the acceptance of loan terms. Consent to electronic communication is typically, if not always, provided in electronic form by the consumer while interacting with the creditor in an online transaction. When a consumer consents to engage in electronic transactions with the creditor, whether electronically or otherwise, the consumer is clearly indicating a preference for, and the capability to undertake, electronic transactions/communications with the creditor, and subsequent acceptance under section 226.39(c) should be permissible as well.

In this situation, the Board's rationale for prohibiting electronic consent as the only means of consent would not be apposite.

As a result, we ask that the Board state in the final rule that where the applicant has consented to electronic transactions with the creditor, it is permissible for the creditor to require electronic acceptance of the loan as the sole method of acceptance, if it so chooses.

c. *Cancellation Period.* Title X and the Proposed Rule provide for a three-day cancellation period following receipt of the Final Disclosure. No loan disbursement may be made during that period. Truth-in-Lending Act § 128(e)(7-8); 12 C.F.R. § 226.38(c)(4).

   i. **Waiver** – The Proposed Rule does not provide any means for consumers to waive the three-day cancellation period after receiving the Final Disclosure. Where the Final Disclosure and loan disbursement will be mailed, the creditor will need to assume three days for mailing the disclosure, and wait for the three-day cancellation period to expire. After the lender then disburses the loan, it would then be another three days for mailing before the borrower received the loan funds. In the Company's experience originating private student loans, private student loan borrowers often need funds in a compressed time frame and some of them will lodge complaints about having to use the entire three-day waiting period. If the consumer has received and reviewed the Final Disclosure and decides to have the loan funds disbursed, he or she may not want to wait for three days before that can happen. We suggest that the Board use its rulemaking authority to provide that the consumer may waive the remaining portion of the three-day cancellation period and authorize loan disbursement by taking some affirmative action (e.g., a telephone call or additional web session) after receipt and review of the Final Disclosure.

ii. **Expiration** – The Proposed Rule provides that the required 3-day cancellation period ends at midnight of the third business day following receipt of the Final Disclosure, and the Board has requested comment on the appropriateness of that deadline. 74 Fed. Reg. 12486. Lenders may not have the operational capability to receive cancellations through midnight, particularly on a Saturday, and even if they do, midnight expiration may present a problem for processing the next day's scheduled disbursements. To avoid these potential problems and provide flexibility for lenders with different systems and processes, the Company suggests any or all of the following alternatives:

a. The Lender may follow the midnight deadline as stated in the Proposed Rule;
b. The Lender may restrict the right to cancel on the third business day to some time earlier than midnight, but extend the cancellation and disbursement blackout period to 5:00 p.m. on the fourth business day following receipt of the Final Disclosure; and/or
c. The Lender may restrict the right to cancel on the third day to some time earlier than midnight, but also
    1. Extend the cancellation period for some reasonable period (e.g., 10 days following receipt of the Final Disclosure);
    2. Disburse the funds on the fourth day following the consumer's receipt of the Final Disclosure; and
    3. Instruct the borrower how to return the disbursement without obligation by the end of the extended cancellation period.

VI. Effect on Current Advertising Rules. Regulation Z's advertising rules require that, if in an advertisement you disclose the amount or percentage of any down payment; the number of payments or period of repayment; the amount of any payment; or the amount of any finance charge, then the lender must also disclose the amount or percentage of any down payment, the APR and terms of repayment,

or an example of a typical extension of credit. Lender web sites for private student loans, which are "advertisements" within the definition of Regulation Z and subject to the requirements of 12 C.F.R. § 226.24, are also very likely to house the lender's application and corresponding Application Disclosure. Combining the requirements of 12 C.F.R. § 226.24 with those of 12 C.F.R. § 226.38(a) creates a situation in which the applicant may see, within a short time, two different repayment examples—one that shows repayment terms for a "typical" extension of credit and prominently displays APR (but possibly not interest rate), and another that prominently displays an interest rate range and uses fixed assumptions for loan terms such as loan amount and deferment period. The combination of these two examples may promote confusion for applicants rather than clarity. Accordingly, the Company suggests that the Board specify that, for a private student loan lender with a product web site that includes the Application Disclosure, the requirements of 12 C.F.R. § 226.24 pertaining to the use of the "trigger terms" listed above may be satisfied by displaying or linking to the Application Disclosure.

VII. Date for Providing Required Disclosures to Schools. The Proposed Rule requires that lenders deliver to covered educational institutions with which they have a preferred lender arrangement the disclosures contained in the Application Disclosure (or a subset thereof) no later than January 1 of each year. 12 C.F.R. § 226.39(f). The Board has requested comment on the appropriateness of the January 1 deadline. The Company believes that disclosures provided by that date will not be meaningful to covered educational institutions because Lenders do not typically finalize product offerings for the upcoming academic year until between January and April. It is also the case that lenders sometimes are not aware that a school has placed them on a list of preferred lenders. Therefore, we suggest that Board consider allowing lenders to deliver the required disclosures no later than April 1 of each year, or, if later, within 30 days after the lender is notified that it has been selected as a preferred lender for the covered educational institution.

VIII. Co-Branding and Promissory Note. In the Proposed Rule's co-branding restrictions, the Board clarifies which uses of a school's mascot, logo, name, etc. (collectively, "School Identifiers"), would use School Identifiers in a potentially misleading way. Proposed Comment 39(a)-1 and 2; 74 Fed. Reg. 12483, 12512. In its commentary, the Board makes clear that the borrower promissory note is subject to the co-branding restrictions, provides examples of uses of school names in promissory notes, and specifies conditions under which certain disclosures need to be made in connection with the use of School Identifiers. *Id.* However, the Board does not include an example of the use of the school's name on the promissory note in connection with and as part of the display of loan information (e.g., the identity of the lender, the name of the loan program, the interest rate margin, the percentage of any fee, etc.). All or nearly all private student loan promissory notes use the school name in this manner. We request that the Board clarify that the use of the school name in congregated loan information in the promissory note, in a font no more conspicuous than other information displayed on the same page, is not potentially misleading and does not require any disclosure about use of the school name.

IX. Administrative Matters.

a. Formatting of Disclosures.

i. **Double-Sided Printing** – Proposed Comment 25 to Appendix H of Regulation Z ("Comment 25") contemplates that the disclosures will printed on two 8 ½ x 11 inch sheets of paper. 74 Fed. Reg. 12514. In order to reduce paper usage and paper and mailing costs, we request that the Board clarify in Comment 25 that the disclosures may be printed on one double-sided piece of paper. We also believe that any reduction in usability will be mitigated if the first page of the disclosure directs the applicant to review the other side.

ii. **Formatting for Window Envelopes** – In revising rules regarding permissible changes to model forms, the Proposed Rule includes new Appendices H-18, H-19, and H-20 among those model forms for which formatting changes may not be made. 74 Fed. Reg. 12514. In order to permit streamlined processes, we request that the Board clarify that the format of the model forms H-18, H-19, and H-20 may be altered so that the applicant/recipient's name and address appears through a window envelope, so long as all other formatting requirements of the Rule and the model forms are met.

iii. **Examples in Model Forms** -- We appreciate the inclusion of sample forms to provide greater clarity regarding the use of the models. We request that the models be enhanced to provide examples of the use of loan origination fees to demonstrate how the Board intends that these amounts be disclosed as part of the itemization of the amount financed.

iv. **Permissible Changes** -- The proposed commentary provision for Appendices G and H includes a description of permissible changes to the forms that may be made without the loss of protection from civil liability. We recommend that the Board include the addition of loan level details to the list of permissible changes, including, but not limited to, date printed, loan identifier, loan type/program, disbursement information and loan acceptance methods (e.g., email, mail, telephone). This information, which is useful to the consumer, should be permissible on the form without the loss of the safe harbor protection, provided that it is included in a manner that does not affect the substance, clarity or meaningful sequence of the forms and clauses.

b. Implementation Timing. The Board has estimated that it will take lenders 40 hours to update systems to incorporate the

new disclosure requirements, 74 Fed. Reg. 12488, and has asked for comment on whether the implementation time for the new requirements should be shorter than six months. 74 Fed. Reg. 12487. The new disclosure requirements present a major operational and technological undertaking that will require the development of new forms, new procedures, new software, and new training, and will consume many times in excess of 40 hours. We will have a difficult time complying with the new requirements by the statutory deadline of February 14, 2010, and therefore request that the implementation deadline be February 14, 2010, allowing for the longest possible implementation time.

In addition, with respect to loans that are in the pipeline during the transition period, we request that the Board adopt clear transition rules that minimize the cost and burdens, and limit the confusion, of the transition. We propose that the new rules be mandatory for applications received after the effective date and optional for applications that have not been consummated by the effective date. It may be necessary, as creditors begin to shift to new forms and new procedures, for customers in the pipeline who may have been initiated under the old system to receive an Approval Disclosure or a Final Disclosure under the new system.

The Company thanks the Board for its consideration of the foregoing comments. Please do not hesitate to contact me if you have any questions about the matters discussed in this Letter.

Sincerely,

Steven J. Scott
Managing Director, Corporate Law